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No. 82-1404

In the Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD ROBERT NIGRO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, after being granted use immunity pursuant to 18 U.S.C. 6002 and 6003, petitioner could properly refuse to testify before a grand jury on the ground that his testimony might be used against him in a prosecution by a foreign government.

2. Whether petitioner could refuse to answer questions before a grand jury because some questions were derived from statements he had made during plea negotiations in a separate case.

3. Whether the government's statement that all electronic surveillance of petitioner had been consensual and its offer to provide petitioner with transcripts of all taped conversations was a sufficient response under 18 U.S.C. 3504(a)(1) to petitioner's assertion that questions might be derived from illegal surveillance.

4. Whether petitioner was given adequate notice and a reasonable opportunity to present his case at his contempt proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is not yet reported. The opinion of the district court (Pet. App. 19-47) is reported at 555 F. Supp. 65.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1982. A petition for rehearing was denied (Pet. App. 54-55) on January 11, 1983. The petition for a writ of certiorari was filed on February 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A grand jury in the United States District Court for the District of Colorado, which was investigating alleged violations of federal narcotics, customs and other laws, subpoenaed petitioner, who was then an inmate in the

federal correctional facility in Talladega, Alabama serving a sentence for narcotics violations, to appear before it (Pet. App. 2). On July 27 and 28, 1982, petitioner appeared before the grand jury, but refused to testify fully; instead he invoked his privilege against self-incrimination (*id.* at 3). Specifically, petitioner refused to answer any questions concerning the illegal transportation of money between the United States and other unnamed countries, the illegal laundering of narcotics money inside and outside the United States, the illegal laundering of narcotics money through offshore corporations and banks, or any sources of money he received from narcotics trafficking (*id.* at 3-4).

On July 28, 1982, the district court, on motion of the government, granted petitioner immunity pursuant to 18 U.S.C. 6002 and 6003, and ordered him to testify (Pet. App. 3). Petitioner was called back before the grand jury but refused to answer any questions (*ibid.*).

The government moved the district court for entry of sanctions against petitioner under 28 U.S.C. 1826(a) for his refusal to comply with the court order compelling his testimony before the grand jury (Pet. App. 4). Petitioner then cross-moved the district court to quash the grand jury subpoena on the grounds, *inter alia*, that the court's immunity order would not extend to a foreign prosecution and thus would not afford him protection co-extensive with his privilege against self-incrimination; that the questions were improperly based on statements he made during plea discussions in an unrelated prosecution in Arizona; and that questions were improperly derived from unlawful electronic surveillance.

After a hearing on the cross-motions the court refused to quash the subpoena, adjudged petitioner in civil contempt, and ordered him confined to prison until such time as he was willing to testify before the grand jury (Pet. App. 19-47). The court found that petitioner had failed to make a

concrete showing that his fear of foreign prosecution was anything more than sheer speculation (Pet. App. 25-26). Moreover, the court held that the secrecy provisions in Fed. R. Crim. P. 6(e) provided sufficient safeguards against disclosure to a foreign government to eliminate any " 'real danger' " that petitioner's testimony would be used in a foreign prosecution (Pet. App. 26-30). With regard to the alleged illegal wiretaps, the court found first that petitioner's claim was so cursory that the government was not even obligated to respond to it but that, in any event, the government had responded fully by representing that a search of its files revealed that the only surveillance had been consensual and that transcripts of those tapes were available to petitioner (Pet. App. 36-37). Finally, the court held that petitioner's statements during discussions regarding a possible plea to narcotics charges in Arizona could properly be used by the government under Fed. R. Crim. P. 11(e)(6)(D), because petitioner had pled guilty to those charges (Pet. App. 38-39).

2. The court of appeals affirmed (Pet. App. 1-18). Because of the time constraints in 28 U.S.C. 1826(b), the court of appeals discussed only the risk of foreign prosecution issue, but noted that it affirmed on all other issues (Pet. App. 18). On the self-incrimination issue it held that under Rule 6(e) grand jury proceedings were sufficiently secret that petitioner could have no reasonable concern about a foreign government's obtaining any of his testimony and using it against him (Pet. App. 11-13). As an additional precaution, however, the court of appeals remanded with a recommendation that, in order to minimize the likelihood of any improper disclosures, the district court should require all participants in the grand jury to take an oath of secrecy, should seal the transcripts of the immunized testimony and should review *in camera* all future requests for the testimony in order to protect petitioner (Pet. App. 16).

ARGUMENT

1. Petitioner contends (Pet. 10-17) that his refusal to testify was justified, despite the grant of immunity, because of the danger that his testimony would be used against him in a foreign prosecution. Even assuming that the Fifth Amendment's protections extend to foreign prosecutions at all,[1] both courts below properly rejected petitioner's claim on the ground that there was no substantial likelihood of foreign prosecution based on petitioner's grand jury testimony.

This Court in *Zicarelli* v. *New Jersey State Commission*, 406 U.S. 472, 478 (1972) (footnote omitted), held that the privilege against self-incrimination protects "real dangers, not remote and speculative possibilities." In applying this standard to immunized grand jury testimony, most courts of appeals, like the court of appeals in this case, have held that the secrecy provisions of Fed. R. Crim. P. 6(e)[2] are sufficient to protect an immunized witness against any realistic danger of use of his testimony in a foreign prosecution. See *In re Baird*, 668 F.2d 432, 434 (8th Cir. 1982), cert. denied, No. 81-6541 (May 17, 1982); *United States* v. *Brummitt*, 665 F.2d 521, 525-526 (5th Cir. 1981), cert. denied, No. 81-1877 (May 17, 1982); *In re Campbell*, 628

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[1]See *Zicarelli* v. *New Jersey State Commission*, 406 U.S. 472, 478-479 (1972). Compare *In re Cardassi*, 351 F. Supp. 1080, 1084-1086 (D. Conn. 1972), with *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970).

[2]Fed. R. Crim. P. 6(e)(2) provides in pertinent part:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. * * * A knowing violation of Rule 6 may be punished as a contempt of court.

F.2d 1260, 1262 (9th Cir. 1980); *In re Federal Grand Jury Witness*, 597 F.2d 1166, 1167-1168 (9th Cir. 1979); *In re Grand Jury Proceedings*, 559 F.2d 234, 236-237 (5th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *In re Weir*, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974); *United States* v. *Armstrong*, 476 F.2d 313, 316 (5th Cir. 1973); *In re Tierney*, 465 F.2d 806, 812 (5th Cir. 1972), cert. denied, 460 U.S. 914 (1973).

These decisions are plainly correct. Fed. R. Crim. P. 6(e)(2) broadly prohibits disclosure of matters occurring before the grand jury under penalty of contempt. Thus, although Fed. R. Crim P. 6(e)(3)(A) authorizes disclosure of grand jury material to a government attorney for use in the performance of his duty and to government personnel deemed necessary to assist a government attorney in enforcing federal criminal law, the persons to whom the material is disclosed are prohibited under penalty of contempt from using it for any other purpose. All other disclosures require the court's permission. Fed. R. Crim. P. 6(e)(3)(C). See *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983). It is most unlikely that the district court, having compelled petitioner to testify under a grant of immunity, would then permit disclosure of his testimony in a way that would undermine the immunity. See *In re Tierney*, *supra*, 465 F.2d at 811.[3]

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[3]Moreover, the court of appeals in this case has provided even greater protection for petitioner by recommending precautions beyond those required by Fed. R. Crim. P. 6(e) (see page 3, *supra*). For their part, the government attorneys below endorsed these measures and represented that they would not disclose petitioner's testimony to anyone without authorization from the court (Appellee's Brief at 13). The additional safeguards ordered by the court of appeals eliminate whatever minimal risk existed that petitioner's testimony would be used against him in a foreign prosecution. See *In re Federal Grand Jury Witness*, *supra*, 597 F.2d at 1167-1168; *In re Tierney*, *supra*, 465 F.2d at 812.

Petitioner argues (Pet. 14-16), however, that there is a conflict between the decision below and the Second Circuit's decision in *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116 (1982). In *Flanagan*, the court of appeals held that a witness could not properly refuse to answer questions on the ground that his testimony might lead to foreign prosecution because the witness had failed to show any substantial likelihood that any foreign government would attempt to prosecute him. In dictum, however, the majority expressed the view that Fed. R. Crim. P. 6(e) does not, by itself, eliminate the self-incrimination issue because the Rule does not sufficiently protect against the risk that a witness' testimony before a grand jury might be used in a foreign prosecution. 691 F.2d at 125. The court's discussion of Rule 6(e) was not necessary to its decision; moreover, the Second Circuit had no reason to consider the special precautions adopted by the court of appeals in this case to protect the witness' testimony. Finally, in light of the finding of the district court that petitioner did not make any concrete showing that his fear of prosecution was based on more than speculation, it is plain that the Second Circuit would also have decided that petitioner was required to testify before the grand jury.[4]

2. In the course of negotiating a plea agreement in connection with the Arizona charges, petitioner and his attorney sought to resolve petitioner's status with regard to the Colorado grand jury investigation in this case by proffering certain information to federal agents who took part in the Arizona plea negotiations (Pet. App. 38-39). After petitioner failed to reach an agreement with the Colorado agents, he pled guilty to the Arizona charges.

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[4]As in *Zicarelli, supra*, petitioner's failure to demonstrate any real danger of a foreign prosecution pretermits the need to consider petitioner's additional contention (Pet. 16-17) that his privilege against self-incrimination extends to a prosecution by another county.

Petitioner contends (Pet. 20-21) that some of the questions the government asked him before the grand jury were improperly derived from statements he had made during plea discussions in connection with narcotics charges against him in Arizona and that he was therefore not required to answer them. In this regard, petitioner relies solely on Fed. R. Crim. P. 11(e)(6)(D), which provides that "any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" are not admissible against the defendant in any subsequent proceeding. Petitioner's claim is without merit.

Fed. R. Crim. P. 11(e)(6)(D) by its terms makes "statement[s] made in the course of plea discussions" privileged only if no guilty plea is entered or the plea is later withdrawn. Here, petitioner's statements were made in the course of plea discussions that led to a plea of guilty to the only charges that were pending. Since that guilty plea has not been withdrawn, his statements are not privileged under Fed. R. Crim P. 11(e)(6)(D), and they could be used by the government as a basis for its grand jury inquiry. See *United States* v. *Benson*, 640 F.2d 136, 138 (8th Cir. 1981).[5]

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[5]Moreover, Fed. R. Crim. P. 11(e)(6)(D) does not bar the use of "statement[s] made in the course of plea discussions" at grand jury proceedings. The rule expressly states that such statements are not admissible "*against* the defendant" (emphasis added) in any civil or criminal proceeding. Since a grand jury proceeding is an *ex parte* investigation to determine whether a crime has been committed and whether criminal charges should be instituted against any individual, it is not an adversary proceeding within the meaning of Fed. R. Crim. P. 11(e)(6)(D). See *United States* v. *Ocanas*, 628 F.2d 353, 357 n.1 (5th Cir. 1980), cert. denied, 451 U.S. 984 (1981). And since petitioner's grand jury testimony is immunized, there is no risk of its being used against him hereafter.

3. Petitioner argues (Pet. 22-23) that he should not have been required to testify before the grand jury because the government's questions were tainted by illegal electronic surveillance. See *Gelbard* v. *United States*, 408 U.S. 41 (1972). At the hearing on this matter, the Assistant United States Attorney announced pursuant to 18 U.S.C. 3504(a)(1)[6] that the government had conducted a thorough search of its files and determined that there had been no electronic surveillance of petitioner of a kind that would require advance judicial authorization (Pet. App. 36). Rather, the records showed that only consensual surveillance had occurred (*ibid.*).[7] Petitioner contends (Pet. 23) that the government's statement was insufficient under 18 U.S.C. 3504(a)(1), both because it was not presented by affidavit and because it was not based upon "first hand inquiry." This contention is without merit.

18 U.S.C. 3504(a)(1) requires only that the government affirm or deny the occurrence of electronic surveillance and does not specify that the denial be made by affidavit. The courts of appeals have routinely accepted unsworn government statements, both oral and written, as to whether electronic surveillance had occurred. See, *e.g.*, *United States* v. *Williams*, 580 F.2d 578, 585 n.38 (D.C. Cir.), cert. denied, 439 U.S. 832 (1978); *In re Berry*, 521 F.2d 179, 185 (10th

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[6]18 U.S.C. 3504(a)(1) provides that "upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act." Under 18 U.S.C. 3504(b) an "unlawful act" includes the use of any electronic device in violation of the Constitution or laws of the United States.

[7]This Court has upheld consensual monitoring of oral communications as constitutional (see *United States* v. *Caceres*, 440 U.S. 741, 750-751 (1979)), and such monitoring is expressly authorized by federal statute. 18 U.S.C. 2511(1)(c) and (d).

Cir.), cert. denied, 423 U.S. 928 (1975); *United States* v. *Aloi*, 511 F.2d 585, 602 (2d Cir.), cert. denied, 423 U.S. 1015 (1975); *United States* v. *Stevens*, 510 F.2d 1101, 1104-1106 (5th Cir. 1975); *United States* v. *D'Andrea*, 495 F.2d 1170, 1174 n.12 (3d Cir.), cert. denied, 419 U.S. 855 (1974).[8]

Nor is there any substance to petitioner's contention (Pet. 23) that the government's denial was insufficient because it was not based upon "first hand inquiry." None of the cases upon which petitioner relies suggests that a government denial of electronic surveillance is insufficient where, as here, the attorney in charge of the case for the government canvasses all relevant agencies and then represents that the agencies did not conduct electronic surveillance of the defendant; indeed, the court in *In re Quinn*, 525 F.2d 222, 226 (1st Cir. 1975), one of the cases cited by petitioner, expressly approved such a procedure.

4. Finally, petitioner contends (Pet. 17-20) that he was deprived of due process at the hearing on his motion to quash because he was given only two days notice, the court failed to indicate that one of the purposes for the hearing was to determine whether petitioner should be held in contempt and he was afforded an insufficient amount of time at the hearing to present his case. The hearing record does not show, however, that petitioner objected to the sufficiency of the notice of the contempt proceeding in the district court or that he sought a continuance in order to prepare for the hearing or additional time in which to

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[8]Only the Seventh Circuit requires the government to respond by affidavit to allegations of unlawful electronic surveillance. See *Korman* v. *United States*, 486 F.2d 926, 931 (7th Cir. 1973). But there is no reason for this Court to consider whether the government's response ordinarily must be by affidavit where a serious claim of illegal surveillance is made, because, as the district court held (Pet. App. 37), petitioner's claim of illegality was so insubstantial on its face that it did not even require a response.

present his case. Nor, in light of the full briefing that preceded the district court's disposition of the case, could petitioner reasonably complain that his rights were violated by the way the hearing was conducted.[9] Accordingly, petitioner's due process claim must fail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

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[9]Indeed, petitioner took the stand at the hearing and testified at length (Tr. 18-26).

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